Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	**)**	
	)	
Communications Assistance for Law	**)**	**ET Docket No. 04-295**
Enforcement Act and Broadband Access	**)**	
and Services	**)**	**RM-10865**
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	)	

COMMENTS OF T-MOBILE USA, INC. ON NOTICE OF PROPOSED RULEMAKING

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SUMMARY

T-Mobile USA, Inc., submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM"), regarding the Commission's efforts to extend the Communications Assistance for Law Enforcement Act ("CALEA") to broadband Internet access and to rewrite CALEA's implementation and enforcement rules. T-Mobile supports law enforcement's efforts in the conduct of lawfully authorized electronic surveillance and dedicates substantial resources to doing so. T-Mobile, however, is concerned with the Commission's proposal to extend CALEA obligations to broadband Internet access services such as Wi-Fi and 3G wireless data services. Congress is the appropriate venue to make that decision, not the Commission, because CALEA expressly excludes information services from its ambit.

T-Mobile also supports the existing framework for implementing and enforcing CALEA. The changes proposed by the Commission are not necessary and alter the careful balance of interests Congress achieved in passing CALEA. Finally, T-Mobile believes that carriers are entitled to recover their costs in providing surveillance assistance and that under both applicable federal and state statutes, courts issuing wiretap orders decide whether the fees charges are reasonable.

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To: The Commission

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T-Mobile USA, Inc. ("T-Mobile") submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM"), regarding the Commission's efforts to extend the Communications Assistance for Law Enforcement Act ("CALEA") to broadband Internet access and to rewrite CALEA's implementation and enforcement rules.[1]

While T-Mobile supports law enforcement's efforts in the conduct of lawfully authorized electronic surveillance and dedicates substantial resources to doing so, T-Mobile does not support the Commission's proposal in the NPRM to extend CALEA obligations to broadband Internet access services such as Wi-Fi and 3G wireless data services.

Nor can T-Mobile support the Commission's new framework for implementing and enforcing CALEA. Extensions, coupled with the FBI's Flexible Deployment Plans, have resulted in timely and efficient compliance. The Commission should not interpret CALEA in

[1] Communications Assistance for Law Enforcement Act and Broadband Access and Services, *Notice of Proposed Rulemaking and Declaratory Ruling*, ET Docket No. 04-295, RM-10865 (rel. Aug. 9, 2004); 69 Fed. Reg. 56976 (Sept. 23, 2004) (NPRM); 69 Fed. Reg. 56956 (Sept. 23, 2004) (Declaratory Ruling).

a way that will yield an enforcement crisis by denying hundreds of pending extension requests and essentially closing off all future extensions. Nor should the Commission interpose third parties that promote independent CALEA solutions as mandatory alternatives to carriers and manufacturers that have not yet developed solutions. Congress did not intend government to dictate compliance solutions.

Further, T-Mobile objects to the Commission's efforts to supplant federal courts as the CALEA enforcement authority. Nothing in CALEA permits this result. Finally, T-Mobile objects to the Commission's inquiry into the rates carriers charge for wiretapping. Federal and state statutes leave it to courts issuing wiretap orders to determine whether rates charged are reasonable..

I. CALEA EXEMPTS INFORMATION SERVICES SUCH AS WI-FI INTERNET ACCESS

T-Mobile is the fourth largest wireless service provider in the nation, offering all digital voice, messaging and wireless data services over its GSM/GPRS network to more than 15.4 million customers in the United States. T-Mobile offers a variety of integrated voice and GPRS capable devices, allowing customers to remotely access the Internet; download e-mail; keep contacts and calendar information updated while mobile; and get games, news and information delivered automatically or on demand to their wireless handset or device. These

are classic information services under the Commission's own determinations and exempted by CALEA.[2]

T-Mobile complements its existing national GSM/GPRS wireless voice and data network by providing Wi-Fi (802.11b) wireless broadband Internet access in more than 4,900 locations, including Starbucks coffeehouses, Borders Books and Music stores, Kinko's locations and major airports and airline clubs, via the T-Mobile HotSpot[SM] service. T-Mobile customers with a Wi-Fi enabled laptop or PDA can access the network on a pay-as-you-go basis or with monthly or prepaid subscriptions at broadband speeds.[3]

The Commission proposes to deem all broadband Internet access services – wireline, cable modem, satellite, wireless, and via powerline – to be telecommunications services subject to CALEA by application of the so-called Substantial Replacement Provision test.[4] T-Mobile disagrees. This conclusion is not supported by the law or its legislative history.

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[2] *See, e.g., In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services: 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, Notice of Proposed Rulemaking,* 17 FCC Rcd 3019 (2002); *In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking,* 17 FCC Rcd 4798 (2002), *aff'd in part and vacated in part sub nom., Brand X Internet Services v. FCC,* 345 F.3d 1120 (9th Cir. 2003)*; In the Matter of IP-Enabled Services,* FCC 04-28, WC Docket No. 04-36, *Notice of Proposed Rulemaking (rel. March 10, 2004).*

[3] The Commission uses the term broadband to mean advanced telecommunications capability and services capable of supporting both upstream and downstream speeds in excess of 200 kbps in the last mile. NPRM ¶ 35 and n.77 (citations omitted). Wi-Fi operates on an unlicensed basis and allows data transfer speeds of up to 11 Mbps for 802.11b and up to 54 Mbps for 802.11a and 802.11g. *See In the Matter of Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993,* 2004 WL 2173485, F.C.C., WT 04-111, FCC 04-216, ¶ 218 (Sep 28, 2004).

[4] NPRM ¶ 47.

According to the Commission, any entity that provides broadband Internet access is deemed to be a telecommunications carrier under CALEA because such access substantially replaces dial-up Internet access functionality previously provided via local exchange service. Even though the Commission acknowledges that Congress specifically exempted information services from CALEA, the Commission finds that Congress created a Trojan horse in the definition of telecommunications carrier that when triggered, trumps the information services exemption.

Congress, however, has unambiguously excluded information services from CALEA: "telecommunications carriers" subject to the provisions of CALEA do not include entities "insofar as they are engaged in providing information services."[5] This should be the end of the matter.[6] The Commission posits, nonetheless, that an information service could replace a substantial portion of the local telephone exchange service and that such an event would set up an "irreconcilable tension" in CALEA between the definition of a telecommunications carrier and the information services exemption. Even if the Commission's argument is granted any force, it still fails because the Commission fails to give effect to all of the Congressional purposes embodied in CALEA and to discern Congress' intent from the legislative history and CALEA hearings.

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[5] 47 U.S.C. § 1001(8)(C)(i)

[6] *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984).

A. The Plain Language of CALEA Exempts Information Services

The assistance capability requirements of CALEA fall exclusively on "telecommunications carriers."[7] The Commission correctly notes that the term "telecommunications carrier" includes "a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of [CALEA]."[8]

Nonetheless, as previously noted, an entity is not a telecommunications carrier to the extent it provides *any* information services. Congress did not limit the definition of information services in any way. In other words, all information services are excluded from the definition of a telecommunications carrier. Importantly, by the very provisions of the statute, Congress contemplated that telecommunications carriers – even those deemed to be a replacement for local exchange service – could provide information services in the future, and it excluded those services from the definition of telecommunications carrier.

To further make the point clear, when imposing the substantive assistance capability obligations on telecommunications carriers, Congress wrote an express limitation into

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[7] 47 U.S.C. § 1002(a) ("a telecommunications carrier shall ensure…").

[8] *Id.* § 1001(8)(B)(ii).

Section 103 for information services.[9] Congress understood the implications in choosing this course – in fact, it appears to have presaged the Commission's very logic and to have rejected it:

> Only telecommunications carriers, as defined in the bill, are required to design and build their switching and transmission systems to comply with the legislated requirements. Earlier digital telephony proposals covered all providers of electronic communications services, which meant every business and institution in the country. That broad approach was not practical. Nor was it justified to meet any law enforcement need.[10]

Thus, the plain reading of CALEA imposes obligations on telecommunications carriers, while it entirely removes any requirements for a particular class of services (*i.e.*, information services) regardless of the entity that offers them.

B. The Purposes of CALEA Are Not Frustrated by Excluding Information Services

The Commission finds CALEA ambiguous because an information service might replace a substantial portion of the local telephone exchange service. This situation would create an "irreconcilable tension" in the statute that, according to the Commission, would frustrate the law's purpose.[11] As noted above, the Commission misreads the law. It also ignores all of the purposes of CALEA and chooses to give effect only to law enforcement's stated goals, which, no matter how laudable, the Commission cannot do.

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[9] *Id.* § 1002(b)(2)("The requirements of subsection (a) do not apply to – (1) information services.")

[10] H.R. Rep. No. 103-827(I), at 13, reprinted in 1994 U.S.C.C.A.N. 3489, 3498 ("*House Report*").

[11] NPRM ¶ 50.

To read the NPRM, one might conclude that the sole purpose of CALEA was to "preserve the government's ability . . . to intercept communications involving advanced technologies."[12] CALEA, however, was a compromise.[13] Equally important was the intent "to protect privacy in the face of increasingly powerful and personally revealing technologies; and . . . to avoid impeding the development of new communications services and technologies."[14] Thus, if any tension exists in the statute, the Commission must resolve it by giving effect to all of its purposes.

The legislative history should instruct the Commission's analysis on this point. To achieve the goal of protecting privacy, Congress stated:

> It is also important from a privacy standpoint to recognize that the scope of the legislation has been greatly narrowed. The only entities required to comply with the functional requirements are telecommunications common carriers, the components of the public switched network where law enforcement agencies have always served most of their surveillance orders.[15]

Congress also made clear that private networks are exempt.[16]

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[12] *Id*, ¶ 52 (citing *House Report*).

[13] *See* Joint Hearings before the Subcommittee on Technology and the Law of the Senate Judiciary Committee and the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee on H.R. 4922 and S. 2375, "Digital Telephony and Law Enforcement Access to Advanced Telecommunications Technologies and Services," Testimony of Federal Bureau of Investigations Director Freeh, at 115 (August 11, 1994).("I believe the legislation before you carefully balances the legitimate concerns of law enforcement, the telecommunications industry, and privacy advocates. It is the product of intense discussion, give and take, and compromise by all parties involved.")

[14] *House Report*, at 3493.

[15] *Id.* at 3498.

[16] *Id.*

As for anticipating future innovation in information services and specifically exempting them from CALEA, Congress was equally explicit:

> It is the Committee's intention not to limit the definition of "information services" to such current services, but rather to anticipate the rapid development of advanced software and to include such services in the definition of "information services." By including such software-based electronic messaging services within the definition of information services, they are excluded from compliance with the requirements of the bill.[17]

Finally, Congress said expressly that CALEA did "not require reengineering of the Internet, nor does it impose prospectively functional requirements on the Internet."[18]

Accordingly, even if conflict existed between the definition of a telecommunications carrier and the exclusion of information services from CALEA, the Commission's approach would not fulfill all of Congress' expressed purposes in passing the Act.

C. The Commission Misinterprets the Meaning of the Substantial Replacement Provision

There are other reasons that the Commission's different definition of well-understood terms fails as well. CALEA is codified in Title 47. Congress wrote CALEA against the backdrop of a decade of telecommunications reform. There were at least four bills pending

[17] *Id.* at 3501.

[18] *Id.* at 3503.

in Congress when CALEA was passed[19] and ultimately telecommunications reform was codified in the Telecommunications Act of 1996.

Indeed, in regard to mobile services, the year before CALEA was passed, Congress preempted States from regulating wireless communications using the replacement or substitution language as follows:

> Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.[20]

Likewise, the concept of "replacement of local exchange service" is applied to the obligations of incumbent carriers. Congress authorized the Commission to treat a carrier as an incumbent local exchange carrier if the Commission finds that "such carrier has *substantially replaced* an incumbent local exchange carrier" and it is in the public interest to do so.[21] A similar formulation appears in regard to permitting a Bell operating company to provide intra-lata incidental services such as "commercial mobile service except where such

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[19] *See e.g.*, The Communications Act of 1994, S. 1822, 103rd Cong § 2 (1994); National Communications Competition and Information Infrastructure Act of 1994, H.R. 3636, 103rd Cong. § 101 (1994); Antitrust and Communications Reform Act of 1994, H.R. 3636, 103rd Cong. § 106 (1993), and The Telecommunications Infrastructure Act of 1993, S. 1086, 103rd Cong. § 4.

[20] *See* Section 6002 of the Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312 (1993) *codified at* 47 U.S.C. § 332(c)(3).

[21] 47 U.S.C. § 251(h)(2).

service is a replacement for land line telephone exchange service for a substantial portion of the land line telephone exchange service in a State."[22]

The Commission ignores these well-established concepts in creating a new definition for the term "replacement" that relies on specific functionality, rather than displacement or substitution of a local exchange carrier and its market power.[23] To support its unique definition, the Commission suggests that Congress meant information services to be limited to dialup Internet access.[24] We do not understand how this could be the case, especially with respect to Wi-Fi. After all, the Commission made the spectrum available in 1985 that made unlicensed services such as Wi-Fi possible.[25] Congress certainly was aware that Wi-Fi and other broadband communications technologies would be used for communications and Internet access by 1994 when it passed CALEA.[26] Indeed, Congress expressly anticipated technological advancements , as evidenced by the preceding discussion of the legislative history of CALEA. The Commission must address the fact that when CALEA was passed,

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[22] *Id.* § 255(e).

[23] NPRM ¶44 n.113.

[24] *Id.*

[25] *See Report of the Unlicensed Working Group and Experimental Devices,* Federal Communications Commission Spectrum Policy Task Force (2002) at 7-10 *available at* *http://www.fcc.gov/sptf/files/E&UWGFinalReport.pdf*

[26] *See Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 184-185 (1988) (Supreme Court "generally presume[s] that Congress is knowledgeable about existing law pertinent to legislation it enacts."); *United States v. Wilson,* 290 F.3d 347, 357 (D.C. Cir. 2002) (In enacting legislation, "Congress is presumed to be aware of established practices and authoritative interpretations of the coordinate branches.").

the Commission itself and Congress understood broadband technologies to hold great promise and yet Congress still exempted such information services from CALEA.

The Commission has it right in its *Broadband Inquiries* where it has determined that broadband Internet access over wireline and cable modem facilities is an information service, even though the result means that information services are exempt from many regulatory requirements including CALEA.[27] Indeed, information services have been exempted from other equally important national policy goals.[28] It is up to Congress to change the law, not the Commission.

II. CARRIERS ARE ENTITLED TO RECOVER REASONABLE ELECTRONIC SURVEILLANCE COSTS

T-Mobile submitted detailed comments in response to the Commission's Public Notice[29] regarding the Joint Petition of the Department of Justice, the Federal Bureau of Investigation and the Drug Enforcement Administration (the "*Petition*").[30] Other carriers likewise submitted their views on the cost of providing electronic surveillance services to law

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[27] *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services: 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements,* Notice of Proposed Rulemaking, 17 FCC Rcd 3019, ¶ 18 n38 (2002) (citations omitted).

[28] *See, e.g.,* 47 U.S.C. § 253(c)(exemption of universal service payment for information services).

[29] Public Notice, *Comment Sought on CALEA Petition for Rulemaking,* RM-10865, DA No. 04-700 (Mar. 12, 2004).

[30] Joint Petition for Expedited Rulemaking of the United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration (filed March 10, 2004).

enforcement agencies.[31] The Commission did not acknowledge any of those comments in the NPRM. T-Mobile incorporates its comments herein by reference and further explains its concerns with the Commission's approach.

A. T-Mobile's Law Enforcement Relations Group

T-Mobile advised the Commission that providing continuous support and technical assistance to law enforcement in the conduct of electronic surveillance is a complex and expensive process under CALEA. The T-Mobile Law Enforcement Relations Group ("LERG") is made up of 22 dedicated professionals who carry out the Commission's CALEA Section 105 mandates to ensure the security and integrity of electronic surveillance as well as respond to other lawful requests for information and assistance on a 7x24x365 basis.[32]

We advised the Commission in our prior comments that T-Mobile responded to over 1,800 electronic surveillance and pen register requests in 2003. As of this filing, T-Mobile has conducted 1885 wiretaps and pen registers already this year (excluding national security requests and extensions of existing orders).

T-Mobile provides a single intercept access point from which law enforcement agencies retrieve intercepted data, and utilizes its own network to backhaul this data from each of its switches nationwide at no cost to law enforcement. T-Mobile also allows law enforcement agencies to select from several secure methods of connection to a single intercept access point. In the case of smaller agencies which cannot afford expensive circuits

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[31] *See, e.g., Comments of Cricket Communications and Comments of Nextel Communications Inc.*

and which do not conduct a large volume of intercepts, T-Mobile provides a free virtual private network connection between the agency and the single intercept access point, and free technical assistance to agencies in setting up and maintaining that connection. None of the costs to transport this data over T-Mobile's network, or the costs of the virtual private network, have been passed on to law enforcement.

T-Mobile has not specifically included the cost of CALEA hardware or software in its charges for electronic surveillance services. As for packet mode communications, T-Mobile has finished deploying the Nokia Lawful Intercept Gateway for packet-data communications, which, if CALEA applied to the services supported on the packet-mode network, would be CALEA compliant. The significant costs associated with this solution, which law enforcement certainly desires, are reasonable expenses that should be recovered on a per order basis from the requesting agency, but T-Mobile has not sought such recovery.

T-Mobile also provides call content delivery to law enforcement via a ring-down feature, and charges a minimal fee of $100 per month for this feature, regardless of how many markets or switches are provisioned for wiretap. The costs of maintaining enough capacity in each market to ensure the ring-down feature is available to law enforcement is significant, and the great bulk of that cost is borne by T-Mobile. The alternative to this would be to require that law enforcement install one T-1 connection to each switch in the target market per every two voice intercepts to achieve full CALEA capacity. In a market such as NY metro, with 21 switches handling wireless calls, an agency conducting 10

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[32] *See* 47 C.F.R. § 64.2100 *et seq.*

concurrent wiretaps could expect to pay as much as $200,000 per month in line fees for sufficient voice-channel circuits. This would represent a significant cost to law enforcement, which might truly preclude their ability to conduct intercept, and T-Mobile offers the ring-down service in good faith hopes that law enforcement will otherwise share in nominal cost offset.

T-Mobile does recover costs related to court-order compliance. These costs include the annual budget for personnel dedicated to court-order compliance, plant cost, equipment and related expenses associated with the direct delivery of intercepted communications and call-identifying information to law enforcement. T-Mobile spreads these costs over all surveillance orders, which results in an average price per order. T-Mobile believes its costs are reasonable and its approach reflects a fair manner of allocating the costs over the 13,000 agencies authorized to conduct some form of surveillance, and it has never been challenged in court to the contrary.[33] T-Mobile recognizes that some agencies in large metropolitan

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[33] The Commission might look to the Federal Bureau of Investigation's own cost recovery rules for CALEA for a standard of when a charge is reasonable. *See* 47 C.F.R. § 200.12:

Reasonable costs.

(a) A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. Reasonableness of specific costs must be examined with particular care in connection with the carrier or its separate divisions that may not be subject to effective competitive restraints. (1) No presumption of reasonableness shall be attached to the incurrence of costs by a carrier. (2) The burden of proof shall be upon the carrier to justify that such cost is reasonable under this part.

(b) Reasonableness depends upon considerations and circumstances, including, but not limited to: (1) Whether a cost is of the type generally recognized as ordinary and necessary for the conduct of the carrier's business or the performance of this obligation; or (2) Whether it is a generally accepted

areas with multiple switches pay a significant cost to conduct surveillance. But charging them less for what amounts to a volume discount would only shift the cost to the smaller and rural agencies. In fact, in an effort to keep costs "reasonable," T-Mobile took unilateral action to cap its fee structure in large market areas. In the NY Metro and California markets, as an example, law enforcement is charged less than half of the potential provisioning fee due to this self-imposed cap.

The Government's primary contention is that fees charged by carriers to facilitate wiretap constitute such a burden to law enforcement that many agencies are priced out of the wiretap business. The 2003 Wiretap Report states that the average state-conducted wiretap cost is $54,223 in 2003, and the average federal wiretap cost is $71,625. Said wiretap, if conducted for 60 days in Washington, D.C. and the surrounding areas (based on T-Mobile's current fee structure), would cost a total of $1,100, or 2% of the overall state and 1.5% of federal wiretap fees. In Tampa, Florida, the same 60-day intercept would cost $400, or less than 1% of the average cost of a federal wiretap. Even in the largest and therefore most expensive wiretap markets, T-Mobile's fees constitute less than 4.5% of the total "average" federal wiretap costs. T-Mobile is further aware that in many drug-related intercepts, the cost of translators and their facilities may drive costs per wiretap well over $500,000, and in those cases, even T-Mobile's most expensive fees would constitute just 0.6% of the overall cost to Government. These figures simply do not square with law enforcement's contention that carrier reimbursement costs are at the core of law enforcement's budgetary challenges.

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sound business practice, arm's-length bargaining or the result of Federal or State laws and/or

Accordingly, T-Mobile disagrees with comments that suggest it may be over-charging law enforcement for electronic surveillance services.[34] The fact is that, as the above discussion illustrates, T-Mobile provides surveillance support at substantially below its costs. T-Mobile does not make a profit on wiretapping, nor would it ever seek to do so, nor is it aware of any other service provider that does so.[35]

B. CALEA-Related Costs Should Be Recoverable

1. Post-1995 Costs

The Commission has tentatively concluded, that "carriers bear responsibility for CALEA development and implementation costs for post-January 1, 1995, equipment and facilities."[36] As noted above, T-Mobile does not include such charges in its fees today, but it reserves the right to do so in the future, particularly as the cost of surveillance in a packet-mode environment potentially may involve new standards, software and hardware.

CALEA did not alter the law in regard to cost recovery for ongoing surveillance. The legislative history of CALEA confirms this point:

> The assistance capability and capacity requirements of the bill are in addition to the existing necessary assistance requirements in sections

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regulations.

[34] *See* Comments of the Office of the Attorney General of New York at 21-22 ("Despite the clear statutory language, it is apparent that many carriers are charging the NY OAG and other law enforcement agencies far more than their 'reasonable expenses incurred in providing facilities and assistance' to effect authorized intercepts.").

[35] Electronic surveillance services are not the same as a bucket of minutes a regular customer might purchase. Surveillance charges are significantly higher on a per order basis than a regular subscriber's minutes, because the costs are shared among only several dozen LEA customers, rather than millions of traditional subscribers.

[36] NPRM ¶ 125

> 2518(4) and 3124 of title 18, and 1805(b) of title 50. The Committee intends that 2518(4), 3124, and 1805(b) will continue to be applied, as they have in the past, to government assistance requests related to specific orders, including, for example, the expenses of leased lines.[37]

Further, Section 229(e) of Title 47, added by CALEA, provides:

> A common carrier may petition the Commission to adjust charges, practices, classifications, and regulations to recover costs expended for making modifications to equipment, facilities, or services pursuant to the requirements of section 103 of the Communications Assistance for Law Enforcement Act (47 U.S.C. 1002).

This provision illustrates that Congress understood that post-1995 costs would be recovered in the fees charges to law enforcement for technical assistance. Law enforcement must pay to modify equipment installed prior to 1995; if it doesn't, the equipment is grandfathered under CALEA until it is replaced. Thus, for this section to be anything other than superfluous, it must apply to post-1995 equipment and authorize a carrier to adjust its tariffs to recover costs.

Because the cost of providing technical assistance to law enforcement includes CALEA hardware and software, there is no reason to address the Commission's query as to whether it should distinguish CALEA capital costs from specific intercept-related costs.[38]

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[37] *House Report* at 3500.

[38] NPRM ¶ 132. T-Mobile notes, however, that there is no definition in CALEA for what constitutes CALEA-related equipment costs, nor does the Commission elaborate in the NPRM on the notion. The Commission should understand that the surveillance infrastructure is complex today and what is or is not CALEA-related may be difficult to separate (e.g., does it include any or all of the following: CALEA software, additional hardware required to initiate and maintain the wiretap, delivery equipment, collection equipment obtained from third party vendors in order to test the delivery equipment, the lab where such equipment is tested usually in concert with law enforcement, training time for employees to understand the equipment and trouble-shoot problems, internal trunking costs borne by carriers to facilitate a national network to deliver surveillance results rather than

2. Provisioning Costs

Neither CALEA, Title 18, nor the corresponding state statutes that mandate reimbursement for rendering technical assistance with wiretaps refer to "provisioning costs." Instead, the statutes generally refer to a carrier's right to recover its "reasonable costs" incurred in providing the technical assistance necessary to meet the government's request.

In regard to federal wiretaps, Section 2518(4) of Title 18 provides in pertinent part:

> Any provider of wire or electronic communication service, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant for reasonable expenses incurred in providing such facilities or assistance.

In regard to federal pen registers and trap and trace surveillance, Section 3124(c) of Title 18 expressly provides for compensation of service providers for installation of a pen register or trap and trace device:

> **Compensation**.—A provider of a wire or electronic communication service, landlord, custodian, or other person who furnishes facilities or technical assistance pursuant to this section shall be reasonably compensated for such reasonable expenses incurred in providing such facilities and assistance.

In the 46 states that authorize by statute some form of wiretap law, compensation is provided expressly by statute or court practice. California, for example, provides that the carrier shall be "fully compensated" for its reasonable costs.[39] Other states require

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imposing the huge burden and cost on law enforcement to provision every single switch in the network and obtain and maintain leased lines for timely intercept).

[39] West's Ann. Cal. Penal Code §629.90.

compensation "for reasonable expenses incurred."[40] Others still require compensation at "prevailing rates."[41]

"Reasonable expenses" under Section 2518 are not defined,[42] but Congress explained its intentions when it amended Title III to include this requirement:

> Subsection 106(b) of the Electronic Communications Privacy Act establishes that service providers that provide assistance to the agency carrying out an interception order may be compensated for reasonable expenses incurred in providing such facilities or assistance. This is designed to permit reimbursement at an amount appropriate to the work required. In most cases, a flat or general rate will be appropriate, but this change in the existing law will permit flexibility by authorizing reimbursement at a higher level in unusual cases.[43]

Carriers generally charge a flat rate based on their reasonable costs of providing the surveillance security office functions. The Commission's rules require carriers to maintain a security office with personnel available 7x24, to keep policies, procedures and records regarding the conduct of electronic surveillance on their premises, and to train employees.[44] The operations cost of providing the security office is a reasonable cost and is recoverable on a per order basis.

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[40] *See e.g.,* C.R.S.A. §16-15-103 (Colorado); F.S.A. §934.09 (Florida).

[41] *See e.g.,* 725 ILCS 5/108B-7 (Illinois); IN ST 35-33.5-4-1(c) (Indiana).

[42] ECPA amended Section 2518 to substitute reasonable expenses for prevailing rates. *See* Par. (4). Pub.L.99-508, § 106(b).

[43] S. REP. 99-541, 1986 U.S.C.C.A.N. 3555.

[44] 47 C.F.R. §§ 64.2100 *et seq.* (implementing 47 U.S.C. § 1006).

The Commission should understand that providing surveillance service requires much more than simply flipping a switch. Carrier personnel handle hundreds of surveillance calls each day from competing agencies. There is no priority system to determine whether the DEA call for a wiretap gets handled before the state sheriff's call for help in setting up a pen register. Both demand instant access and service and neither are sympathetic to a plea for patience. The LERG security professionals handle the requests with remarkable professionalism.

But these are things into which the Commission lacks jurisdiction to inquire. At best, Section 229(e) permits the Commission to "allow carriers to adjust such charges, practices, classifications, and regulations in order to carry out the purposes of [CALEA]." But this plainly is in the context of the Joint Board under Section 229(c). In response to this mandate, the Commission sought comment on how to separate the costs a carrier incurred in meeting CALEA Section 103 requirements.[45] Thus, the Commission's role in establishing whether a carrier charge is reasonable or not is limited to CALEA charges.

III. "TRUSTED THIRD PARTY" SOLUTIONS AND SAFE HARBOR STANDARDS

The Commission seeks comment on the feasibility of using "a trusted third party to extract content and call-identifying information of a communication from packets."[46] The

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[45] *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, *Notice of Proposed Rulemaking*, 12 FCC Rcd 22120, ¶ 108-110 (1997).

[46] NPRM ¶ 72.

Commission describes trusted third parties as "service bureau[s] with a system that has access to a carrier's network and remotely manages the intercept process for the carrier."[47] T-Mobile supports the fundamental CALEA principle that the carrier itself should be able to choose the methodology for compliance.[48]

The Commission states that the mere availability of a trusted third party solution makes call-identifying information reasonably available to a carrier.[49] In the abstract, with enough engineering time and money, all things may be possible. But it is at best premature for the Commission to conclude anything about trusted third parties.

The Commission asks whether a carrier can be compelled to use a third party to provide more information than is reasonably available through its own "safe harbor" solution.[50] Implicit in the Commission's inquiry seems to be an assumption that the delivery function is the primary limiting factor in providing lawful intercept, when in fact, the most dependable leg of the intercept operation is usually the CALEA mediation system and the final delivery leg for call identifying data destined for the LEA. Granted, delivery costs for some carriers may be expensive, and third parties may help reduce costs, but not likely reliability. Intercept failures are rare within the core carrier network, but when they do occur,

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[47] *Id.* ¶ 69.

[48] *House Report* at 3499 ("The legislation provides that the telecommunications industry itself shall decide how to implement law enforcement's requirements.")

[49] NPRM ¶ 70.

[50] *Id.* ¶ 73.

they are usually due to failed switch software, failed trunking lines for voice channel delivery, or human error in provisioning the data and voice paths.

The next most common problem involves the interface between the carrier and the myriad of collection equipment used by law enforcement. While a third party again might provide some cost efficiency, there seems to be little reliability gain in these cases, especially for larger carriers with properly staffed security offices. Finally, when there are issues at the core of a carrier network, the trusted third party will not be able to resolve them. One wonders whether law enforcement needs are better served by reduced carrier security office staff because the solution has been "out-sourced" and another failure point added.

Again, T-Mobile believes that each carrier has the option of choosing a CALEA solution that fits its particular needs or circumstances. The Commission lacks authority under the statute to declare a trusted third party to be an alternative to a safe harbor standard or a carrier's individualized solution. The Commission's role under CALEA is to set standards upon the petition of an interested party or to determine a standard's adequacy if challenged.[51]

Under the CALEA framework, if the Attorney General is concerned about a carrier's compliance, his remedy is to seek an enforcement order in federal court.[52] A court may issue such an order if:

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[51] 47 U.S.C. § 1006(a)-(c).

[52] *Id.* § 1007.

> (1) alternative technologies or capabilities or the facilities of another carrier are not reasonably available to law enforcement for implementing the interception of communications or access to call-identifying information; and
> (2) compliance with the requirements of this title [47 U.S.C.S. §§ 1001 et seq.] is reasonably achievable through the application of available technology to the equipment, facility, or service at issue or would have been reasonably achievable if timely action had been taken.[53]

Thus, a court might consider whether a trusted third party provides available technology or not, but that is not the Commission's prerogative.

A carrier that seeks to implement a CALEA solution through a trusted third party no doubt will consider the enforcement issue as paramount. It is apparent that negotiations will occur not only between the parties but also with government agencies that will have to interconnect with the trusted third party to receive intercepted communications and call-identifying information. No doubt the parties will address liability issues such as whether the carrier will be responsible for a technical or security failure on the part of the third party provider. Carriers will also want to know whether the outsource cost of compliance will be a "provisioning cost" in law enforcement's language, or an unrecoverable CALEA cost as it asserts generally in its *Petition*.

These are all questions the Commission will need to address if it finds that a trusted third party solution is worth exploring. But in the end, the technology choice must remain that of the carrier, not some third party.

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[53] *Id.*

IV. EXTENSIONS AND ENFORCEMENT UNDER CALEA

The Commission effectively eliminates any future extensions of the CALEA compliance date under Section 107(c) and would dismiss 800 pending petitions as denied, despite a decade of granting extensions under its own interpretation of the very same statute. Section 107 does not limit extensions at all for equipment or services that did not exist prior to 1998 or that carriers did not propose to deploy prior to 1998. Certainly, some compliance period would come into play when the Commission deems an entity to be a carrier after 1998, such as the Commission proposes to do in this proceeding with information services.

While T-Mobile does not support an overly broad reading of the Commission's general authority under Section 229(a), Congress expressly delegated authority to the Commission in regard to extensions and reasonable achievability determinations. It seems obvious that for equipment or services to be deployed now or in the future, some orderly process is desirable to achieve compliance. While T-Mobile and most other commenters did not support the DoJ approach for an E-911-like framework, the proposition supports the point that the Commission can establish extension rules going forward.

That said, it would not be fair or reasonable for the Commission to declare all broadband Internet access to be covered by CALEA and then afford only 90 days to achieve compliance. Packet-mode compliance has been an issue since 1998 and standards have only recently been completed. T-Mobile uses a manufacturer-provided solution today for its packet network. But the Commission has put these voluntary efforts into doubt by raising the spectre that the industry standard may be deficient and that new standards or requirements might be imposed in the future. This kind of uncertainty does not help bring solutions to

fruition, so the Commission should give its support to the voluntary standards process unless or until a party brings forth specific technological challenges to a capability.

We also note that the Commission's approach would create an enforcement crisis – no extensions, no safe harbor and uncertain requirements. The matter is made worse because the Commission further sets itself up to adjudicate compliance notwithstanding that Congress expressly and only provided for enforcement in the federal courts.[54]

Section 108 provides that a federal court may only issue an enforcement order if it finds:

> (1) alternative technologies or capabilities or the facilities of another carrier are not reasonably available to law enforcement for implementing the interception of communications or access to call-identifying information; and (2) compliance with the requirements of this title is reasonably achievable through the application of available technology to the equipment, facility, or service at issue or would have been reasonably achievable if timely action had been taken.[55]

Even then, a carrier that finds itself subject to an enforcement order has more protections in court than the Commission proposes with its new enforcement regime. Section 108(b) requires a court to:

> specify a reasonable time and conditions for complying with its order, considering the good faith efforts to comply in a timely manner, any effect on the carrier's, manufacturer's, or service provider's ability to continue to do business, the degree of culpability or delay in

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[54] 47 U.S.C. § 1007(a). Congress' grant of some authority to the Commission is not a plenary grant of all authority. *Railway Labor Exec. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994)(en banc). Further, the legislative history of CALEA provides not a hint that Congress intended the Commission, instead of the courts, to be the enforcing power for CALEA violations.

[55] 47 U.S.C. § 1007(a).

> undertaking efforts to comply, and such other matters as justice may require.

The Commission's approach to extensions and enforcement is premised on a false notion – that no extensions are required because the threat of enforcement will yield compliance. That was not Congress' approach at all -- CALEA plainly states that deployment of new technology may occur regardless of whether a solution is available.[56] As Congress said of the limitations in Section 103 and Section 108 confirms:

> This means that if a service of technology cannot reasonably be brought into compliance with the interception requirements, then the service or technology can be deployed. This is the exact opposite of the original versions of the legislation, which would have barred introduction of services or features that could not be tapped. One factor to be considered when determining whether compliance is reasonable is the cost to the carrier of compliance compared to the carrier's overall cost of developing or acquiring and deploying the feature or service in question.[57]

Moreover, Congress placed the burden ultimately on the court in Section 108 to determine whether compliance was reasonably achievable:

> Second, the court must find that compliance with the requirements of the bill is reasonably achievable through application of available technology, or would have been reasonably achievable if timely action had been taken. Of necessity, a determination of "reasonably achievable" will involve a consideration of economic factors. This limitation is intended to excuse a failure to comply with the assistance capability requirements or capacity notices where the total cost of compliance is wholly out of proportion to the usefulness of achieving compliance for a particular type or category of services or features.

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[56] *Id.* § 1002(b)(1)(law enforcement may not "prohibit the adoption of any equipment, facility, service, or feature by any provider of a wire or electronic communication service, any manufacturer of telecommunications equipment, or any provider of telecommunications support services.").

[57] *House Report* at 3499.

> This subsection recognizes that, in certain circumstances, telecommunications carriers may deploy features or services even though they are not in compliance with the requirements of this bill. In the event that either of these standards is not met, the court may not issue an enforcement order and the carrier may proceed with deployment, or with continued offering to the public, of the feature or service at issue.[58]

T-Mobile supports a reasoned extension program based on defined criteria, and does not support the Commission's suggestion that it can structure an alternative to court adjudication of any noncompliance.

V. CONCLUSION

For all of the reasons above, the Commission should reject the notion that CALEA applies to information services such as Wi-Fi Internet access. It should continue to offer extensions to achieve cost-effective implementation of CALEA and leave it to the courts to adjudicate whether carriers fail to comply. Similarly, it is for the courts to decide whether a wiretap charge is reasonable. In the end, the application of CALEA to broadband Internet access and other information services is for Congress to decide.

Respectfully submitted,

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[58] *Id.* at 3508-3509.